**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| In the Matter of<br><br>Application of Verizon New Jersey, Inc., BellAtlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a/ Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region InterLata Services in New Jersey | ) | CC Docket No. 01-347 |

**REPLY COMMENTS OF AT&T CORP.**


Mark E. Haddad
David L. Lawson
R. Merinda Wilson
Ronald S. Flagg
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Mark C. Rosenblum
Lawrence Lafaro
Richard Rubin
James Talbot
Frederick C. Pappalardo
AT&T CORP.
295 Basking Ridge, NJ
(908) 221-4481

*Attorneys for AT&T Corp.*


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**REPLY COMMENTS OF AT&T CORP.**

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the application of Verizon for authorization to provide in-region, interLATA services in New Jersey.

## INTRODUCTION AND SUMMARY

The comments filed in this proceeding decisively establish that Verizon's Section 271 application for New Jersey should be denied. Even as the sixth anniversary of the Telecommunications Act of 1996 nears, the New Jersey local market is not open to CLECs. The comments demonstrate, in particular, both that there is virtually no UNE-based or facilities-based residential competition in New Jersey (and the minimal residential resale competition is decreasing),[1] and that the lack of competition is attributable to Verizon's historical and continuing failure to meet several checklist obligations as well as to the persistence of significant

[1] *See ex parte* letter from Clint E. Odom (Verizon) to Magalie Roman Salas, dated January 29, 2002.

entry barriers. The comments confirm that Verizon's monopoly control over the local residential market in New Jersey remains secure.

To grant Verizon's application in such circumstances would profoundly damage consumer welfare. It would enable Verizon to maintain its local monopoly and extend it into the long-distance market, quickly gain market share with its unique ability to offer one-stop shopping to residential customers, and then raise long-distance prices. The comments thus amply demonstrate that the inevitable result of granting this application would be the remonopolization of telecommunications service that Section 271 is expressly designed to prevent.

These Reply Comments are organized around the same issues and concerns that AT&T highlighted in its opening Comments. Part I reviews the record evidence relating to the various price squeezes effectuated by Verizon's prohibitively high recurring switching rates and non-recurring hot cut charges. The Comments confirm that Verizon's hot cut rates are inflated far above TELRIC levels – over 5 times higher than its existing rate, and 40 times higher than the rate in Pennsylvania – and preclude any possibility of facilities-based local entry using UNE-loops. Likewise, the comments show that Verizon's recurring switching rates are based on models that violate myriad TELRIC principles that substantially inflate those rates, again creating a price squeeze that precludes state-wide UNE-based entry. Thus, Verizon's inflated New Jersey UNE rates continue to protect Verizon's stranglehold over residential customers in New Jersey.

Part II addresses Verizon's lack of compliance with its obligation to provide parity of access to its operations support systems. The BPU's conclusion that Verizon meets its OSS obligations is simply without foundation, particularly in view of the BPU's own admission that order volumes in New Jersey are "relatively modest" and that Verizon's OSS were not subjected to end-to-end volume testing by KPMG. The BPU's various responses to these and other deficiencies in the OSS – including the BPU's rationalization that the CLECs expressed no interest in a "commercial availability period" that would have verified whether the results of the KPMG testing were reliable and accurate – do not withstand scrutiny. Indeed, the BPU's decision to attach conditions to its finding of OSS compliance reveals its lack of confidence that Verizon is providing electronic billing to CLECs in an adequate and timely manner.

Furthermore, Verizon's own performance data, as well as the evidence submitted in the comments, show that Verizon falls well short of providing nondiscriminatory access to its OSS, even at the exceptionally low order volumes that are submitted in New Jersey. According to Verizon's most recently reported data, for example, barely half of UNE orders flow through its systems without manual intervention. By contrast, in other States in the Verizon region, the comparable current UNE flow-through rates are substantially higher (approximately 81 percent in Pennsylvania, for example). Similarly, Verizon's OSS reject more than 40 percent of all UNE orders – a rate almost twice that in Pennsylvania and three times that in New York, where total order volumes are vastly higher. Verizon's abysmal performance in these and other areas shows that it cannot plausibly claim that it currently meets its OSS obligations in New Jersey under the 1996 Act.

Part III of these Reply Comments addresses issues relating to Verizon's performance data and the performance incentive plan ("PIP") that is presently in place in New Jersey. The comments, as well as Verizon's most recent *ex parte* submissions, confirm that the performance data on which Verizon relies fail to demonstrate Verizon's present compliance with the checklist. The evidence shows that Verizon's data collection and performance reporting processes are so error-ridden that its reported results, to the extent they remain stable, cannot reasonably serve as probative evidence that Verizon has somehow satisfied its statutory obligations.

Furthermore, notwithstanding the assertions of the BPU to the contrary, no solace can be taken that the PIP will somehow resolve these problems or effectively deter anticompetitive conduct in the wake of any Section 271 relief. Inasmuch as Verizon is relying on its performance data to support its Application, the problems regarding the integrity and reliability of Verizon's data must be and should be resolved before Section 271 entry. Assuring the accuracy of Verizon's data is not only important to checklist compliance, but it is also essential to the effectiveness of the PIP. Additionally, the many structural defects in the PIP render it wholly inadequate to assure checklist compliance post Section 271 entry. Putting these defects aside, there remains uncertainty as to whether the PIP will remain in effect. Even the BPU has conceded that, during State proceedings, Verizon questioned its authority to impose remedies for its performance failures. Critically, the time period for seeking any appeal from the BPU's final order approving the PIP has not run, the BPU has not conditioned its approval of Verizon's application on Verizon's waiver of its right to challenge the BPU's authority or the final order, and Verizon has not waived its right to mount such a challenge. Under these circumstances, Verizon's reliance on the PIP as evidence that it will comply with its statutory obligations after Section 271 entry is misplaced.

## I. VERIZON'S NEW JERSEY UNE RATES VIOLATE CHECKLIST ITEM 2 AND APPROVAL OF VERIZON'S APPLICATION WOULD CONTRAVENE THE PUBLIC INTEREST.

Verizon's recurring switching and non-recurring hot cut rates are far above TELRIC levels and foreclose competitive local entry in New Jersey. As demonstrated by the comments, the cost models used to develop Verizon's New Jersey local switching rates contain myriad TELRIC violations that substantially inflate those rates. It is not surprising, therefore, that a margin analysis shows that profitable UNE-platform based residential entry in New Jersey is not possible, and that carriers have confirmed that they cannot profitably provide UNE-platform based services in New Jersey. The comments further demonstrate that Verizon's massively increased New Jersey hot cut rates – which are as much as 40 times higher than Verizon's hot cut rates in neighboring states and 5 times higher than Verizon's prior New Jersey hot cut rates – preclude facilities-based UNE-L entry in that state.[2]

Verizon has not even seriously attempted to show that its vastly inflated New Jersey rates comply with TELRIC principles. Rather Verizon claims that TELRIC issues can be ignored altogether because its New Jersey rates compare favorably to those in New York. Whatever the validity of Verizon's New York interim rates when they were established in 1996, those rates plainly cannot be used as a benchmark in this proceeding because the New York Public Service Commission ("NYPSC") has now substantially reduced those rates. And as explained by this Commission in its *Massachusetts 271 Order* (¶ 29), "[i]f the New York Commission adopts modified UNE rates, future section 271 applicants could no longer demonstrate TELRIC compliance by showing that their rates . . . are equivalent to or based on the

[2] Inflated hot cut rates not only preclude UNE-loop competition but also inhibit UNE-Platform entry, as they preclude economically rational migration from UNE-P to UNE-L.

[then] current New York rates." Thus, Verizon's benchmarking analysis, which relies on New York's *old* rates, only shows that critical New Jersey rates are similar to rates that are plainly well above TELRIC levels.

The comments further confirm that Verizon's Application is premature because Verizon has denied parties sufficient opportunity to comment on the new rates adopted by the NJBPU by rushing its application to the Commission before the NJBPU has issued a final order adopting New Jersey's rates. As pointed out by the DOJ, "[t]he New Jersey BPU issued a summary order . . . three days before Verizon filed [its] . . . application" and "the New Jersey BPU has not yet issued a final order fully setting forth the Board's analysis of the issues, the positions of the parties, and the reasoning underlying the Board's determinations." DOJ Eval. at 6-7 (internal quotations omitted); *see also* XO Comments at 3; TeleTruth at 4.[3] Moreover, Verizon has not committed to accepting the rates adopted by the NJBPU. Indeed, Verizon has left open the possibility that it will appeal the rate reductions adopted by the NJBPU. *See* DOJ Eval. at 7. Verizon should not be permitted to simultaneously take mutually inconsistent positions – relying on the BPU's UNE rates while holding out a challenge of such rates.

In short, Verizon's New Jersey Application fails to comply with Checklist Item 2 because its New Jersey recurring switching rates and NRCs for hot cut functions are far above those that any reasonable application of TELRIC principles would produce. In addition, approval of Verizon's application would not be in the public interest because Verizon's massively

[3] Verizon's refusal to allow the NJBPU to issue an order and to examine its Section 271 application before it was filed with the Commission also concerned the NJBPU. *See, e.g.*, Remarks of NJBPU Commissioner Butler at January 9, 2002 Hearing (Verizon "needs to know that I am outraged by [its] . . . lack of respect for the [NJBPU] . . . demonstrated by [its] . . . filing

overstated recurring and non-recurring rates create price squeezes that preclude facilities-based and UNE-platform based local entry in New Jersey. Thus, Verizon's application should be rejected because (1) it fails to comply with Checklist Item 2 and (2) it would not be in the public interest to approve it.

### A. Verizon's Non-Recurring Hot Cut Charges Are Still Vastly Overstated And Foreclose Facilities-Based UNE-Loop Entry In New Jersey.

The comments confirm that Verizon's nonrecurring charges ("NRCs") for hot cuts are not remotely TELRIC compliant and preclude UNE-loop facilities-based entry in New Jersey. *See* ASCENT at 2-7; Cavalier at 2-5; Conversent at 2-6; DOJ Eval. at 7-8; AT&T at 11-15. For every residential or business customer that a CLEC wins from Verizon, the CLEC must now pay Verizon a minimum hot cut NRC of $159.76 to have that customer's line physically transferred so that it terminates at the CLEC's facilities (or more than $230 if the hot cut requires a customer premises visit).[4] Those rates are as much as 40 times higher than Verizon's NRCs in neighboring states and five times higher than Verizon's prior New Jersey hot cut rates. *See* DOJ Eval. at 7, n.29. And Verizon has offered "[n]o justification for this difference." *Id.* at 8.

Verizon's New Jersey hot cut NRCs are not even close to being TELRIC-compliant. As demonstrated by AT&T in the most recent NJBPU UNE rate proceeding, a

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of [its] . . . 271 approval at the FCC before this board had finished its deliberations of the merits of this case").

[4] Verizon has reaffirmed that its New Jersey rates will reflect these massive hot cut NRC increases. *See* Letter from Hesser G. McBride, Verizon Attorney, to Henry Ogden, NJBPU, *Re: In the Matter of the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc., Docket No. TO00060356* (dated January 22, 2002) ("*Verizon Hot Cut Letter*").

TELRIC-compliant initial hot cut NRC without a premises visit in New Jersey would be $2.77.[5] A comparison of Verizon's two wire initial installation NRC to its two wire initial hot cut NRC without a premises visit illustrates this point. Both services require Verizon to install a two wire loop. The only measurable difference between a two wire installation and a two wire hot cut is that a two wire hot cut, in addition to installation, also requires Verizon to disconnect the loop from its own switching equipment within a specified time frame. Yet Verizon's two wire hot cut NRC is $130.30 more than its two wire installation NRC.

Verizon has attempted to explain away this obvious discrepancy by asserting that the cost differential is justified because hot cuts require certain "coordination" efforts that initial installations do not. *See Verizon Hot Cut Letter* at 2. However, Verizon has offered no data to support its claim that a two wire disconnect plus "coordination" efforts would result in the forward-looking hot cut rates exceeding two wire disconnect rates by *600 percent.* Thus, Verizon's hot cut rates fail to comply with Checklist Item 2.

The comments demonstrate that Verizon's bloated New Jersey hot cut NRCs create a classic price squeeze that foreclose UNE-loop facilities-based residential and business local entry plans in New Jersey. *See* ASCENT at 2-7; Cavalier at 2-5; Conversent at 2-6; XO at 17-21; AT&T at 14. Indeed, Verizon's new $159.76/ line hot cut NRC extends the time it would take a new entrant to recover its up-front costs of obtaining a new customer far beyond any reasonable expected customer retention period. *See, e.g.,* ASCENT at 5; Cavalier at 10; AT&T at 14. As noted by the DOJ, "[s]everal facilities-based CLECs have asserted that the new hot-cut NRCs will inhibit their ability to compete in the local telecommunications market." DOJ Eval. at

[5] *See* AT&T Comments at 12.

8. This is particularly significant because most of the limited competitive entry in New Jersey has occurred through facilities-based entry.[6] The exorbitant hot cut rates will bring these efforts to an end.

For example, Conversent Communications has stated that, based on Verizon's increased New Jersey hot cut charges, Conversent would find it "necessary . . . to abandon in New Jersey its present business plan." Conversent Comments at 6. And Cavalier explained that given Verizon's new hot cut charges in New Jersey, "it is not economically feasible for Cavalier to expand its . . . facilities-based UNE-L telephone business plan into New Jersey." Cavalier Snyder Decl. ¶¶ 6, 9-11; *see also* AT&T Huels Decl. ¶ 9 (describing effect of new NRCs on AT&T's entry plans).

There is no question, therefore, that Verizon's massively overstated New Jersey hot cut rates preclude facilities-based entry in New Jersey and will allow Verizon to retain its monopoly control over residential customers. As emphasized by the Commission, "local telecommunications markets must *first* be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market." *Michigan 271 Order* ¶ 388 (emphasis added). Thus, Verizon's application must be denied because approval of the application would contravene the public interest.

### B. Verizon's Local Recurring Switching Rates Remain Well Above TELRIC Levels And Preclude Residential UNE-P Entry In New Jersey.

As demonstrated by WorldCom (Frentrup Decl. ¶¶ 3-22) and AT&T (at 15), Verizon's switching rates are based on myriad TELRIC-violations, including (1) the computation

[6] Most of the business lines served by CLECs involve the use of CLEC facilities. DOJ Eval. at 4-5.

of per-minute switch usage rates based only on *peak* usage days, ignoring weekend and holiday usage; (2) the inclusion of the costs of vertical features in the switch usage rather than the port rate and; (3) the improper use of "growth" switch discounts to compute both port and switch usage rates. As a result of these and other non-TELRIC assumptions, Verizon's New Jersey switching rates are substantially overstated and preclude competitive local entry in New Jersey.

Competitive local exchange carriers currently "provide less than one-tenth of one percent of all residential lines using the UNE-platform" in New Jersey. DOJ Eval. at 5. That paltry level of local entry is unlikely to increase given Verizon's overstated New Jersey switching rates. As demonstrated by WorldCom, after accounting for carriers' internal costs of entry, local entrants in New Jersey would "lose several dollars on every [residential] customer every month." WorldCom at 6. That analysis is consistent with carriers' real-world experience. Z-Tel has explained that because Verizon's UNE-platform rates are so high relative to local retail rates in New Jersey, it "cannot reasonably provide residential service in New Jersey without losing substantial sums of money on every sale." Z-Tel at 2-3. Likewise, "WorldCom would like to serve a broad range of customers in New Jersey, as [it does in] other states, by offering a package that includes local service to the mass residential market," but "[d]ue to Verizon's high prices for UNEs . . . WorldCom is unable to do so." Worldcom at 5. In essence, Verizon's recurring switching rates for New Jersey "*doom*[] competitors to failure." *Sprint Comm. Co. v. FCC*, 2001 U.S. App. LEXIS 27292 at * 13 (D.C. Cir. 2001) (emphasis in original).

Verizon has asserted that the Commission should brush aside these serious problems with its New Jersey switching rates because those rates fall within some "reasonable range" of Verizon's New York rates. *See* Verizon Br. at 95-97. That benchmarking analysis, however, is based on outdated New York rates that the NYPSC has since replaced with substantially lower rates. *See* Order on Unbundled Network Element Rates, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-1357 (January 28, 2002). As shown in the following chart, the Verizon New Jersey rates are more than double the New York switching rates:

| | New Jersey Switching Rates | New York Switching Rates |
|---|---|---|
| Originating | $.002773 | $0.001147 |
| Terminating | $.002508 | $0.001111 |

Verizon's benchmarking analysis, therefore, ultimately serves only to show that Verizon's New Jersey rates are comparable to recurring rates that the NYPSC has effectively found to be far above TELRIC levels. Thus, Verizon's analysis only confirms that Verizon's recurring switching rates are not TELRIC-compliant.

Verizon is also likely to assert that the new New York rates should be ignored because its application was filed before the NYPSC replaced its overstated rates with substantially lower rates. That is nonsense. As explained by this Commission, "[i]f the New York Commission adopts modified UNE rates, future section 271 applicants could no longer demonstrate TELRIC compliance by showing that their rates . . . are equivalent to or based on the [then] current New York rates," and that "a decision by the New York Commission to modify [its switching] rates may undermine Verizon's reliance on those rates." *Massachusetts 271 Order* ¶ 29. The mere fact that Verizon was able to rush its application to the Commission a few weeks before the NYPSC adopted substantially lower recurring rates – which, as Verizon was well aware, were pending before the NYPSC as "recommended rates" for several months – is not sufficient grounds to completely disregard the Commission's mandate and the NYPSC's determination that Verizon's old rates were well above TELRIC levels.

In fact, it would make a mockery of the 271 process if the Commission were to turn a blind eye to the NYPSC's findings and pretend that New York's old recurring rates are TELRIC-compliant for the limited purpose of assessing Verizon's New Jersey Section 271 application. In effect, that would permit Verizon to obtain Section 271-approval based on an imaginary world where New York's old rates are TELRIC-compliant. Back in the real world, of course, Verizon would have obtained Section 271 authority based on recurring rates that plainly exceed those that any reasonable application of TELRIC principles would have produced, thereby precluding local entry in New Jersey. *See Michigan 271 Order* ¶ 281 ("efficient competitive entry into the local market is vitally dependent upon appropriate pricing").

Verizon is likely to invoke the Commission's "complete when filed" rule to support its contention that no new information that appears after its Application is filed should be considered in assessing whether its rates are TELRIC compliant. The Commission has already rejected that argument. In the past, the Commission has agreed to re-evaluate (and ultimately approve) Applications based on prices that were adopted by the applicant long *after* its Application had been filed. *See KN/OK 271 Order* ¶¶ 22 - 27. The Commission determined that the applicant's lower rates could easily be "evaluated" and would "clearly foster the development of competition." *See id.* ¶¶ 23-24. Similarly, the Commission should account for new rates adopted by a *state commission* after the filing date, where (as here) they are easily evaluated and show that the Applicant's recurring rates cannot possibly foster development of competition. Any other rule would result in a double-standard, where only information filed by a Section 271 applicant after its initial filing date will be considered by the Commission, and any information filed by other parties – including information relating to state commission determinations – will be ignored. That result would create the distinct impression that the Commission will waive its "complete when filed" rule only where the waiver would benefit the Applicant.

Put simply, Verizon cannot reasonably rely on the old New York recurring rates to justify its overstated New Jersey recurring rates because the NYPSC, by adopting substantially lower recurring rates for New York, has effectively found its old rates to be well above TELRIC levels. Such a conclusion would lead to a contorted outcome of approval with immediate non-compliance. Nor can Verizon rely on its rates in Massachusetts or Pennsylvania to justify its New Jersey switching rates, because the switching rates in both Massachusetts and Pennsylvania were themselves justified based on a benchmarking comparison to New York's old rates. *See Pennsylvania 271 Order* ¶¶ 61-67; *Massachusetts 271 Order* ¶¶ 23-27. Thus, the Commission should decline Verizon's invitation to brush aside the serious TELRIC errors in it New Jersey rates and the resulting price squeezes that preclude local entry in New Jersey based on comparison to outdated New York switching rates.

The bottom line is that Verizon's New Jersey switching rates are far above those that any reasonable application of TELRIC principles would have produced. Verizon's application should, therefore, be denied because it fails to comply with Checklist Item 2. Furthermore, Verizon's application should be rejected for the separate independent reason that approval of the application would contravene the public interest. Indeed, Verizon's recurring switching rates preclude UNE-platform based entry in New Jersey.

## II. THE COMMENTS DEMONSTRATE THAT VERIZON DOES NOT PROVIDE NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

With the exception of the BPU, the parties commenting on the issue agree that Verizon has not shown that it provides nondiscriminatory access to its OSS. AT&T at 16-23; ATX at 23-28; MetTel at 6-14; New Jersey Division of the Ratepayer Advocate ("DRA") at 20-23; XO at 9-13; TeleTruth at 3-4, 7-14.[7] The BPU's conclusion that Verizon has met its burden of proof does not withstand scrutiny, for the BPU's own analysis of the OSS issue shows that there are serious evidentiary and system deficiencies that preclude any finding that Verizon complies with its OSS obligations. *See* BPU at 24-43.

In the first place, the BPU admits that Verizon has not presented sufficient evidence of commercial usage to establish that it is providing nondiscriminatory access. *See* AT&T at 17. The BPU, for example, notes that "CLEC order volumes in the state seem relatively modest to date," even though "a record of successful commercial operation is the most probative form of evidence for the compliance of Verizon NJ's OSS with Section 271 standards." BPU at 30. Instead, the BPU relies on "the combination of commercial usage and KPMG test results," while suggesting that the CLECs expressed no interest in a "commercial

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[7] *See also* Z-Tel at 2-3 & n.6 (although Z-Tel is not in a position to comment on whether Verizon has complied with the checklist because Z-Tel has not entered the New Jersey local telecommunications market – in part due to Verizon's unreasonably high rates on UNEs – "Z-Tel strongly suspects that the same OSS problems that it experiences in many Verizon states, such as billing OSS in Pennsylvania and other Bell Atlantic South states, are present in New Jersey"); WorldCom at ii (because WorldCom is unable to enter the New Jersey market due to excessive UNE rates, it "do[es] not have the commercial experience to be able to discuss the adequacy of the New Jersey [OSS] as a practical matter"); Network Access Solutions at 2-3 (Verizon has provided more favorable treatment to its own customers than to NAS customers in such areas as missed appointments, standard intervals for dispatch, mean time to repair, and trouble report rates).

availability period" that would confirm whether the results of the KPMG testing were reliable. *Id.*

The BPU's reasoning is fundamentally flawed. Contrary to the suggestion of the BPU, this Commission's reliance on a "combination" of commercial usage and test results in previous Section 271 proceedings cannot serve as a precedent here. *See id.* For example, in the proceedings involving Verizon's Section 271 application for New York, the evidence showed that the OSS were already processing large volumes of orders – not the "relatively modest" volumes currently handled in New Jersey. AT&T at 19 n.10.[8]

Moreover, the results of KPMG's testing do not suffice to prove that Verizon provides nondiscriminatory access to its OSS. Although the BPU describes the KPMG test as "thorough" and "comprehensive" (BPU at 25, 87), the evidence shows that the test was too limited in scope and depth, and insufficiently blind, to serve as evidence that Verizon is meeting its OSS obligations. AT&T at 17-20. Most notably, as the BPU admits, KPMG's volume testing was not conducted on an end-to-end basis, and "did not extend . . . to provisioning, maintenance and billing systems." BPU at 30. *See also* AT&T at 17-18; TeleTruth at 3, 10.

The BPU attempts to excuse this critical deficiency by reasoning that the latter systems "were subject to individual testing." BPU at 30. The BPU, however, misses the point. Testing of these functions on a "piecemeal" basis provides no indication as to how all of the OSS

[8] The Department of Justice, in recommending approval of Verizon's application, states that "there have been few complaints regarding Verizon's New Jersey OSS." DOJ Eval. at 6. Any lack of complaints about OSS, however, is due to the lack of usage of the OSS – which is attributable to the high UNE rates that have precluded entry into the New Jersey local exchange market. AT&T at 17; *see also* WorldCom at ii.

functions will operate on a seamless, integrated basis in the commercial production environment. AT&T at 17-18.

The BPU's suggestion that the lack of end-to-end testing in the KPMG New Jersey test is justified because KPMG used a similar approach in other states for which Verizon has received 271 approval is without merit. *See* BPU at 30. The volume of transactions (particularly UNE transactions) in New Jersey is extremely low in comparison to the volumes in New York, Pennsylvania, and Massachusetts at the time Verizon filed Section 271 applications for those states. AT&T at 19 n.10, 23 n.12, & Kirchberger/Nurse/Kamal Decl. ¶ 25. Thus, the record in those prior proceedings contained some evidence that the OSS were capable of handling large volumes of orders in a mass-market environment, even though KPMG's volume test had not been performed on an end-to-end basis. The record here, by contrast, contains no such evidence.

The absence of end-to-end testing is a particularly serious flaw in the KPMG testing because Verizon's OSS use a service order processor ("SOP") that is unique to New Jersey. AT&T at 18-19. Despite the critical importance of the SOP to ordering, provisioning and billing, the BPU's discussion of the SOP is limited to its finding that the KPMG volume testing "presented [the] SOP with a greater than expected level of near term orders," and that the results of the testing were "satisfactory." BPU at 30. The BPU, however, again misses the point: without end-to-end testing that includes the provisioning and billing processes, there is no basis for concluding that the performance of the SOP will be "satisfactory" on a commercial basis, regardless of the volumes of orders that are submitted. AT&T at 18-19.

In an apparent attempt to defend the absence of sufficient commercial usage and comprehensive third-party testing, the BPU reasons that during a conference call on January 30, 2001, "no CLEC exhibit[ed] interest" in a "commercial availability period," which would have permitted the development of commercial data sufficient to validate the accuracy and reliability of the results of the KPMG testing. BPU at 30.[9] The BPU's assertion is misleading.

AT&T has repeatedly requested the BPU to require a commercial availability period in New Jersey. In May 1999, for example, AT&T requested that the BPU require a three-month commercial availability period similar to that ordered in Pennsylvania by that state's Public Utility Commission.[10] However, the BPU did not grant AT&T's request. During the January 30, 2001, conference call cited by the BPU, the BPU Staff "offered" to consider a

[9] The BPU cites the existing "system of performance measurements, performance standards and remedies for non-compliance" as an additional reason why "there is no need for commercial experience at this point to confirm the adequacy of Verizon NJ's OSS." BPU at 30. As AT&T has previously demonstrated, however, Verizon's performance data are unreliable and its performance incentive plan ("PIP") is demonstrably inadequate. AT&T at 24-29. Because the PIP was approved by the BPU only recently, there is no basis for concluding that the PIP will be a sufficient incentive to Verizon to comply in the future with its OSS obligations if its application is approved. DRA at 22. In any event, the Commission has never held that the existence of a PIP can serve as a surrogate for the absence of sufficient data on commercial usage. *See New York 271 Order* ¶¶ 423-424, 433 (stating that existence of a performance assurance plan is relevant to the issue of whether approval of an application is consistent with the public interest, but that even "a strong public interest showing can not overcome a failure to demonstrate compliance with one or more checklist items").

[10] *See* Comments of AT&T Communications of New Jersey, Inc. Regarding the Staff's May 13, 1999 Report and Proposal, filed May 27, 1999, in BPU Docket Nos. TX95120631, *et al.*, at 2-3, 14-17 ("AT&T Comments") (attached hereto as Attachment 1). At the time AT&T filed its Comments, the Pennsylvania Public Utility Commission had already included such a period in its OSS process, recognizing that the KPMG testing environment can differ from the actual production environment. *Id.* at 15-17. The PPUC directed that the three-month period run as part of its Section 271 review proceeding. *See* DRA at 21; PPUC Docket No. M-0001435, *Consultative Report on Application of Verizon Pennsylvania, Inc., for FCC Authorization to Provide In-Region, InterLATA Service in Pennsylvania*, Procedural Order issued November 30, 2000, at 12-13. The Pennsylvania commercial availability period began in January 2001, after KPMG had completed its testing, and ran through March 2001.

commercial availability period – but *only* if CLECs (either individually or collectively) submitted a total of at least 10,000 to 15,000 orders per day (or per week).[11] The BPU Staff – which made its "offer" after learning that AT&T had cancelled its plans to conduct "friendly" testing -- made clear that it was not interested in a commercial availability period involving smaller volumes.[12] The CLECs "exhibited no interest" in Staff's proposal because, quite simply, it was unrealistic. At the time of the Staff's "offer," the high level of UNE rates and the substandard performance of the OSS precluded substantial CLEC entry into the New Jersey local exchange market (as is still the case today).[13] The BPU Staff's proposal would have required AT&T (and any other CLEC) to incur hundreds of thousands of dollars in expenditures (paying the exorbitant non-TELRIC UNE rates) to submit the volumes of orders expected by the BPU Staff, because the CLECs

[11]BPU Staff did not specify whether it expected the volumes to be submitted on a single day or during the course of a week. However, Staff stated that the purpose of the test was to determine whether the volumes adequately tested the capacity of Verizon's OSS.

[12] In early 2000, AT&T had intended to conduct a "friendly" test involving several hundred orders to determine whether Verizon's OSS would function properly. This test would have been conducted on a parallel basis with the third-party test being conducted by KPMG. Unlike a commercial availability period, which involves the submission of actual commercial orders and actual provisioning of orders by Verizon, the "friendly" test would have involved only a limited number of orders that would not have been "blind" to Verizon. However, in mid-2000 AT&T decided to postpone the "friendly" test because testing at that stage would have been premature and a waste of both financial and human resources, in view of the substandard performance of Verizon's OSS and the high level of UNE rates. When the BPU Staff (which had encouraged AT&T to conduct the test) expressed concern about this postponement, AT&T advised the Staff that, once the problems involving the OSS and UNE rates were resolved, AT&T anticipated that the testing would proceed. *See* letter from Robert J. Kirchberger (AT&T) to Anthony Centrella (BPU), dated June 16, 2000 (attached hereto as Attachment 2); letter from Anthony F. Centrella (BPU) to Robert J. Kirchberger (AT&T), dated June 9, 2000 (attached hereto as Attachment 3). As the evidence in this proceeding demonstrates, however, neither problem has been resolved. As a result, in January 2001 AT&T decided not to conduct the test and requested Verizon to disconnect the lines that were to be used for the "friendly" test.

[13] In contrast, AT&T's proposal for a commercial availability period was made at an early point in the process and where it was anticipated that such a period would occur after TELRIC-compliant UNE rates were in effect. However, in January 2001, BPU Staff was aware that new rates were not in effect as the hearings in the UNE proceeding were ongoing.

would be purchasing thousands of UNE-P lines for which they had no actual customers. No CLEC would have agreed to engage in such commercially unreasonable activities.

Despite the BPU's failure to order a commercial availability period on reasonable terms and conditions, Verizon's own reported performance data show that its OSS render poor performance in the actual production environment – contrary to the "perfect score" and "clean slate" given to the OSS by KPMG in its artificial, controlled testing environment. *See* AT&T at 20-23; DRA at 21; TeleTruth at 3, 8. However, rather than recognize these deficiencies in Verizon's performance, the BPU simply seeks to excuse them. For example, the BPU finds that Verizon's "overall" flow-through performance is satisfactory because it handles more orders "via mechanized processes than manually" – ignoring the fact that flow-through rates for UNE orders have been below 50 percent through November 2001. AT&T at 21 & n.11; BPU at 33.[14] Similarly, while acknowledging that "timely and accurate completion notifications . . . are an integral part of provisioning," the BPU finds that "for the most part" Verizon is exceeding the BPU's standards for such notices – even though Verizon's own reported data, and data submitted in this proceeding, show that Verizon is not doing so. BPU at 34; AT&T at 22; MetTel at 8 & Chart 2 (describing unreasonably long return times for completion notices).

[14] The remainder of the BPU's analysis of flow-through is similarly deficient. Although the BPU relies on the KPMG flow-through test as evidence that Verizon's systems "are capable of flowing-through a high percentage of CLEC orders," the BPU overlooks the fact that KPMG confined its analysis to orders that VNJ had already designed to flow through its systems without manual intervention. *See* BPU at 33; AT&T Kirchberger/Nurse/Kamal Decl. ¶ 66 n.33. Furthermore, the BPU finds no significance in Verizon's failure to meet the applicable benchmark for the "achieved flow-through rate" (the percentage of orders designed to flow through that actually flow through), on the ground that this Commission does not require such data to be included in a Section 271 application -- even though *Verizon itself* relies on that rate in its application as evidence that its flow-through performance is satisfactory. *See* BPU at 32 n.214; Application at 63 n.62; AT&T Kirchberger/Nurse/Kamal Decl. ¶ 66.

With respect to billing, the BPU finds that Verizon "is providing nondiscriminatory wholesale billing based upon the record evidence presented including actual performance and the findings of KPMG and PWC," subject to two conditions (described below). BPU at 40-41. The BPU, however, conducts no analysis of Verizon's actual billing performance, as reflected by Verizon's own performance data and the evidence submitted by CLECs. *See id.* at 39-41. That evidence – including data regarding billing accuracy – shows that Verizon is providing discriminatory performance in wholesale billing, either for paper bills or for electronic bills.[15] Furthermore, as AT&T has previously shown, the reviews by KPMG and PWC were too limited in scope to provide any support for the BPU's conclusions.[16]

Indeed, despite its finding of compliance, the BPU effectively admits that Verizon has *not* shown that it provides electronic billing – which the BPU describes as "an essential component of the billing process" – on a nondiscriminatory basis. *See* BPU at 40. The two conditions imposed by the BPU on its finding of compliance reflect a clear lack of confidence by

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[15] For example, even taking into account its newly-reported data for December 2001, the error rate for Verizon's wholesale bills has exceeded that for its retail bills in three of the last six months for which Verizon has reported data. *See* AT&T at 22. The comments confirm that the wholesale bills that Verizon sends to CLECs are frequently erroneous, and that – even though it has acknowledged many such errors – Verizon has not fixed its billing systems to eliminate the problem. ATX at 23-24, 28 (describing the "substantial and repeated errors" in Verizon's bills over the past few years and Verizon's failure to correct its systems to prevent the recurrence of such errors, despite requests by ATX that Verizon do so); TeleTruth at 3, 7-8 (finding that, based on an examination of Verizon's bills, approximately 50 percent of wholesale and retail bills issued by Verizon have errors). In addition, ATX, which has significant experience in providing local exchange service in New Jersey, states that the electronic bills provided to date by Verizon do not contain sufficient information to be verified, and may not reflect actual usage by CLEC customers. *See* ATX at 26-28.

[16]*See* AT&T at 20 & Kirchberger/Nurse/Kamal Decl. ¶¶ 51-53. As the BPU acknowledges, KPMG's review was limited to paper bills – not electronic bills. BPU at 41. Furthermore, PWC's review included no assessment of the accuracy of electronic bills, which are not even fully consistent with paper bills. *See* Kirchberger/Nurse/Kamal Decl. ¶ 53.

the BPU that Verizon's electronic bills meet the requirements of Section 271. First, finding that it is "important to the continued expansion of a robust competitive marketplace that Verizon provide reliable electronic bills to CLECs," the BPU requires Verizon to continue its "manual review and balancing process" – which is designed to ensure that its electronic bills balance internally and match its paper bills. *Id.* at 41.[17] Second, Verizon is required to include metrics for the timeliness and accuracy of electronic billing in the New Jersey Carrier-to-Carrier Guidelines and the Performance Incentive Plan. *Id.*[18] These conditions – particularly the continuation of the manual review and balancing process – would be wholly unnecessary if the BPU was fully satisfied that Verizon currently provides electronic bills in a timely and accurate manner.[19]

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[17] Verizon is to continue this process until it demonstrates to the satisfaction of the BPU Staff that manual balancing is unnecessary to produce adequately balanced electronic bills for CLECs. BPU at 41.

[18] In its discussion of UNE rates, the BPU also requires Verizon to provide the BPU Staff with copies of initial bills reflecting the new UNE rates prescribed by the BPU, and to "periodically provide copies of sample bills to confirm that it is continuing to bill lawful rates for its UNEs." BPU at 24. Although the BPU states that the purpose of these requirements is to ensure Verizon's compliance with the BPU's new pricing decision (*id.*), the requirements plainly reflect – at least in part – a lack of confidence by the BPU that Verizon's bills will accurately reflect the rates. Indeed, Verizon recently acknowledged to the BPU that its bills are likely to contain errors. *See* AT&T at 22 & Kirchberger/Nurse/Kamal Decl. ¶ 111 & Att. 7.

[19] Like the BPU, the Department of Justice, although supporting approval of Verizon's application, appears unconvinced that Verizon's electronic billing is adequate. The DOJ states that the problems of accuracy and auditability that it had noted in connection with Verizon's Section 271 application for Pennsylvania "may also be present in New Jersey because Verizon uses the same billing system there." DOJ Eval. at 5-6 n.21. Moreover, the DOJ states that "given the level of competitive entry in New Jersey, it is difficult to assess whether Verizon's electronic wholesale billing system is working properly." *Id.* Although the DOJ suggests only that the Commission monitor Verizon's post-approval compliance (rather than deny the application), the DOJ's statements clearly reflect a concern that Verizon has still not met its obligation to provide accurate and timely electronic bills to CLECs. Furthermore, although the DOJ suggests that Verizon's failure to provide accurate and reliable electronic bills has produced no significant competitive harm (*id*.), the DOJ's suggestion overlooks the specific complaints of

Finally, Verizon's reported performance data for December 2001 confirm that, in numerous respects, the performance of its OSS continues to be inadequate to provide CLECs with a meaningful opportunity to compete. For example:

- The December total flow-through rate for UNE orders (Performance Metric ("PM") OR-5-01) was only 51.35 percent. Although that rate represents a slight increase over the November rate of 47.84 percent, December is the first (and only) month in 2001 in which the UNE flow-through rate has exceeded 50 percent. *See* AT&T at 20. As shown in Attachment 4 hereto, the December UNE flow-through rate in New Jersey – like the rates for the other months of 2001 -- is substantially lower than the UNE flow-through rates in States in the Verizon region where Section 271 approval has been granted. For example, in December the UNE flow-through rates for Pennsylvania and New York were 80.84 percent and 87.74 percent, respectively – even though the order volumes in those States were vastly greater than those submitted in New Jersey. *See* Attachment 4 hereto.

- In December, the "achieved" flow-through rate for UNEs (PM OR-5-03, which is the percentage of UNE orders designed to flow through that actually flow through) *declined* to 77.93 percent – the second consecutive month in which the rate has declined from the 86.84 percent rate reported for October. *Id.*, Kirchberger/Nurse/Kamal Decl. ¶ 66. Thus, more than 20 percent of orders designed to flow through fell out for manual processing in December, with the accompanying risks of delay and errors. By contrast, in both New York and Massachusetts the achieved flow-through rates for December were approximately 96 percent and 97 percent, respectively – nearly 20 percentage points higher than the rate for New Jersey. *See* Attachment 4 hereto. The December achieved flow-through rate for New Jersey is the latest reflection of the instability of Verizon's performance in that State, where the UNE achieved flow-through rate has fluctuated substantially throughout 2001. *See* AT&T Kirchberger/Nurse/Kamal Decl. ¶ 68.

- Verizon's rejection rate for UNE orders in December (OR-3-01) was 40.86 percent. Although lower than the November rate of 47.23 percent, the December rate constitutes unsatisfactory performance by any standard. AT&T at 21. This rate is more than twice that reported for New York and Massachusetts, and nearly twice that reported for Pennsylvania, in the same month. *See* Attachment 4 hereto. Indeed, in New York the December rejection rate was only 14.9 percent – even though the volumes of UNE orders

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CLECs such as ATX, the low level of competition in New Jersey, and the absence of any showing by Verizon that it can provide adequate electronic bills reflecting the new UNE rates.

submitted in that State were more than *30 times* those submitted in New Jersey. *Id.* Verizon cannot blame such disparate performance on "CLEC error," since many of the same CLECs in New Jersey operate in the other Verizon states, and do so using the same interfaces.

- In December (as in the case of every month since June 2001), Verizon failed to meet the applicable parity standard for Performance Measurement OR-4-06 for UNEs, which measures the average time from work completion in the Service Order Processor to bill completion. The disparity reported for December (12.36 hours for Verizon compared to 16.43 hours for the CLECs) is only slightly lower than that reported for November. *See* AT&T Kirchberger/Nurse/Kamal Decl. ¶ 107.

- Verizon failed to provide parity of service in December with respect to the average "offered" interval, and average "completed" interval, for hot cut loops where no dispatch is required (PR-1-01-3111 and PR–2-01-3111). Verizon has failed to meet the parity requirement for these metrics since at least April 2001. *See id.* ¶ 113; *ex parte* letter from Clint E. Odom (Verizon) to Magalie Roman Salas, dated January 2, 2002, at 145-147 (Trend Reports for PR-1-01 and PR-2-01) ("January 2 *ex parte*")

- Similarly, in December the percentage of repeat trouble reports within 30 days for loops (MR-5-01-3112) was considerably higher for CLECs than for Verizon's retail operations, thus failing the BPU's parity standard. Verizon has failed to meet that standard for each month since at least April 2001. January 2 *ex parte* at 202.

- Verizon's performance in December deteriorated in the areas of Network Trouble Report Rate – Central Office – Platform (MR-2-03-3140), Percent Missed Repair Appointment – Platform (MR-3-01-3140), and Percent Missed Repair Appointment – Central Office – Platform (MR-3-02-3140). In contrast to previous months, Verizon violated the BPU's standard of parity for these measurements. *See id.* at 195, 197-198.

A system in which more than 40 percent of UNE orders are rejected, almost 50 percent of non-rejected UNE orders fall out for manual processing, and where loops are not provisioned on a nondiscriminatory basis is plainly inadequate to meet the requirements of Section 271. Verizon's own data show that it has yet to meet its OSS obligations in New Jersey.

## III. VERIZON'S PERFORMANCE DATA AND THE NEW JERSEY PERFORMANCE INCENTIVE PLAN ARE INADEQUATE.

### A. Verizon's Performance Data Are Unreliable.

The comments confirm that Verizon cannot properly rely on its performance data as evidence that it has met its statutory obligations. In this regard, Verizon's reported performance data are so unreliable that they cannot reasonably be considered a reflection of Verizon's actual performance. AT&T at 25-26; MetTel at 4-5, 8.[20] Indeed, the continuing stream of Verizon's metrics change controls notices — which are littered with admissions regarding Verizon's error-ridden performance monitoring and reporting notices — illustrate that Verizon's performance reports are inaccurate, incomplete, and untrustworthy. AT&T Comments at 25-26.

Conceding that Verizon "has experienced certain problems" in implementing the Carrier-to-Carrier Guidelines, the BPU, nevertheless, dismisses the CLECs' concerns regarding the integrity and reliability of Verizon's data. BPU at 80. In attempting to bolster this finding, the BPU states that "KPMG's favorable report and successful replication show that implementation problems identified by Verizon NJ have been or are being resolved," and that "[a]ny remaining concerns of the CLECs are addressed by the Incentive Plan . . . ." BPU at 80-81. The BPU is wrong on both counts.

Verizon's most recent *ex parte* filings before this Commission and metrics change control notices underscore that Verizon's data monitoring and reporting processes are still plagued with problems that render its performance results highly suspect. In an *ex parte* filed on

[20] Thus, for example, MetTel notes that "a significant percentage of the data that Verizon's systems in New Jersey generate and transmit is inaccurate," including Verizon's order status notifiers. MetTel at 5, 8-9. MetTel further states that "[i]n addition to creating ongoing operational problems with data that is not meaningful or useful, Verizon uses the inaccurate data

January 22, 2002, Verizon admits that "it recently discovered a *software programming error* that caused certain trouble reports for Special Services to be excluded from its Carrier-to-Carrier Performance Reports."[21] Verizon states further that it "also discovered that special access circuits were inadvertently included in the retail comparison group for Special Services, contrary to the New Jersey business rules," and that "[t]hese errors affected the installation quality measures and the maintenance measures for both resale and unbundled Special Services" (*id*.) (footnote omitted). Additionally, Verizon concedes that "a small number of retail observations were excluded from the retail performance results," and that it is currently "working to modify its systems to capture these observations." *Id*. at 1 n.1. Significantly, although Verizon states that it has recalculated its performance reports to correct these errors (with the exception of its improper exclusion of retail observations), Verizon does *not* state that it has resolved the software programming error that generated inaccuracies in its performance data. *Id.* at 2.

Furthermore, in its January 28 *ex parte,* Verizon admits that it "recently became aware of two issues that led to the total number of observations for certain provisioning and maintenance and repair measurements for the five reporting regions in New Jersey being slightly lower than the reported statewide number of observations for those measurements."[22] Verizon asserts that one factor was its omission of 1,700 retail lines from its regionwide performance

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in its reports on performance measures making actual performance impossible to determine." *Id.* at 5.

[21] *Ex parte* letter from Clint E. Odom (Verizon) to Magalie Roman Salas, dated January 22, 2002, at 1 (emphasis added).

[22] *Ex parte* letter from Clint E. Odom (Verizon) to Magalie Roman Salas, dated January 28, 2002, at 1.

reports; while the other was its failure to maintain "the most up-to-date NPA/NXX tables" in the systems used to create performance reports. *Id*. at 2.

Similarly, Verizon's most recent metrics change control notices are further proof that its performance data simply cannot be trusted, and that its prior reported results are inaccurate and remain uncorrected. In a metrics change control notice dated January 25, 2002, Verizon admitted that, since June 2000, the line counts in its performance data for certain Maintenance Specials metrics improperly included Direct Inward PBX trunks.[23] In a metrics change control notice dated January 30, 2002, Verizon conceded that, from February 2001 to January 2002, certain Complex UNE loop orders were misclassified as Specials or POTs orders in its ordering data.[24] Additionally, in a metrics change control notice dated January 31, 2002, Verizon admitted that a small percentage of duplicate ASRs for Specials and Trunks were included in its ordering data from July 2000 to September 2001.[25]

Verizon's *ex parte* submissions — coupled with its metrics change control notices which are replete with admissions regarding problems and errors that have adversely affected Verizon's performance monitoring and reporting processes — show that Verizon has not met its burden of demonstrating that its performance results "are meaningful, accurate and reproducible." *KS/OK 271 Order* ¶ 278. *See also* AT&T Comments at 25-26. Furthermore, Verizon's *ex parte* submissions and metrics change control notices highlight that KPMG's

[23] Metrics Change Control Notification CC# CCNJ2002-03613-Mai, dated January 25, 2002 (Attachment 5 hereto).

[24] Metrics Change Control Notification CC# CCNJ2001-02320 Ord, dated January 30, 2002 (Attachment 6 hereto).

[25] Metrics Change Control Notification CC# CCNJ2002-03416 Ord, dated January 31, 2002 Attachment 7 hereto).

metrics test results — which in many instances failed to detect these errors — cannot reasonably be considered persuasive evidence of the accuracy and reliability of Verizon's data. AT&T at 26.

### B. The New Jersey Performance Incentive Plan Will Not Deter Backsliding.

Contrary to the conclusions reached by the BPU, the PIP will not and cannot eliminate the CLECs' concerns regarding the inherent unreliability of Verizon's data. In that connection, the BPU states that any concerns that the CLECs have regarding the integrity of Verizon's performance data are adequately addressed by those provisions in the PIP which require Verizon to make "payments to a state fund for C2C reports that are late or inaccurate or incomplete." BPU at 81. The BPU's analysis is demonstrably unsound.

Because Verizon is relying on its performance data to establish checklist compliance, it bears the burden of demonstrating *before* Section 271 entry that its data are accurate and reliable. Verizon has failed to meet that burden. Additionally, implicit in the BPU's analysis is the assumption that Verizon's reporting processes are sufficiently stable that Verizon can detect promptly any errors in its performance results, and that it will restate its performance reports so that CLECs can determine whether incentive payments are warranted. However, there is no sound basis for such an assumption.

As Verizon's metrics change control notices and *ex parte* submissions confirm, it has sometimes taken Verizon months — even well over a year — to detect errors in its performance data. AT&T at 26. Moreover, some of Verizon's problems affecting the reliability of its data remain unresolved. *Id.* Worse yet, Verizon has stated publicly that it has no obligation to correct and restate its performance reports containing known errors. Indeed, Verizon has made no commitment to recalculate erroneous CLEC-specific performance reports or process corrected reports through the PIP remedies algorithm. *Id.* As a result, CLECs, the BPU and this Commission may never know whether Verizon's performance warrants incentive payments to the CLECs or special payments to the State fund for inaccurate performance reports. *Id.* For all of these reasons, the BPU's reliance on the PIP as a mechanism to eliminate or resolve concerns regarding the validity of Verizon's data is misplaced.

Before addressing the specific defects of the PIP, it is noteworthy that Verizon still has not filed the "detailed monthly [remedy] reports" required by the BPU. In its final order approving the New Jersey PIP, the BPU directed Verizon to make such filings within ten business days "from the filing of each month's performance report."[26] It has been over 15 business days from the directive and Verizon has not filed a report for the November data month. This action illustrates Verizon's ongoing noncompliance with BPU directives and also has prevented AT&T and other parties from commenting on the sufficiency and accuracy of the PIP reports.

Contrary to Verizon's claims and the findings of the BPU, the PIP contains inherent defects that would preclude it from serving as an effective deterrent to anti-competitive conduct. In this regard, the Commission has determined that, when an applicant relies on a performance remedy plan in its application, the Commission, as part of its "independent determination" will review the details of that plan to assess whether it provides sufficient incentives for future compliance with Section 271. *NY 271 Order* ¶ 433; *Texas 271 Order* ¶ 423; *KS/OK 271 Order* ¶ 273. Thus, the Commission has rejected the notion that it should simply

[26] *See* BPU Order Approving Incentive Plan, *In the Matter of the Investigation Regarding Local Exchange Competition for Telecommunications Services*, Docket Nos. TX95120631 and TX98010010 (Jan. 10, 2002) ("BPU January 10 Order"), at 23.

defer to a State Commission's finding that a particular performance remedy plan is adequate. That holding is clearly correct because Congress assigned to the Commission the task of making an independent determination of whether approval of a Section 271 application would be "consistent with the public interest, convenience, and necessity" under Section 271(d)(3)(C). Although the Commission certainly may take the State commission's views regarding the adequacy of the performance remedy plan into consideration, the statute clearly requires the Commission to conduct its own review of such plan, rather than simply rubber-stamp a State commission's approval – as the Commission has recognized. [27]

Moreover, while the Commission has not specified all of the particular requirements that a given performance remedy plan must satisfy in order to assure future checklist compliance, it has identified certain "important characteristics" that increase the likelihood that the enforcement mechanisms "will be effective in practice." *New York 271 Order* ¶ 433. Thus, in the *NY 271 Order*, the Commission found that the New York PAP would serve as an effective mechanism for ensuring "marketing-opening performance" by Verizon after it received Section 271 authorization because it contained, *inter alia:* (1) performance standards encompassing a "comprehensive range of carrier-to-carrier performance;" (2) provisions providing "a meaningful and significant incentive to comply with the designated performance

[27] In the *NY 271 Order*, for example, the Commission conducted its own assessment as to whether the structural elements of the New York Performance Assurance Plan ("New York PAP") appeared reasonably designed to detect and sanction subpar performance by Verizon when it occurs. The Commission found that the amended performance assurance plan and amended change control assurance plan in New York "set forth, in great detail, the processes by which Bell Atlantic's performance is measured and evaluated, the method for determining compliance and non-compliance with respect to individual metrics, and the manner in which noncompliance with individual metrics will translate into bill credits." *See NY 271 Order* ¶ 440. Only after addressing criticisms of the New York PAP by the commenters did the Commission state that it

standards;" and (3) self-executing measures that do "not leave the door open unreasonably to litigation and appeal." *Id.*. In its decisions reviewing subsequent State Section 271 applications, the Commission has similarly reviewed the State performance enforcement plans for these same characteristics.[28] The PIP does not satisfy these criteria.

The PIP does not cover a "comprehensive range of carrier-to-carrier performance" because, unlike the New York performance remedy plan, it imposes no remedies for unacceptably low *total* flow-through rates. Thus, although Verizon's total flow-through rates are significantly lower than those in New York, the PIP provides no incentive for Verizon to improve its flow-through performance. AT&T at 28. The effectiveness of the PIP is not only compromised by its glaring omission of any measure on total flow-through, but also by other structural defects that shield Verizon from any significant financial consequences for discriminatory performance. These deficiencies include: (1) a transaction-based approach that assures that Verizon will incur paltry penalties for anti-competitive conduct; (2) provisions that do not correlate incentive payments properly with the severity of competitive harm caused by discriminatory performance; (3) a flawed statistical methodology; and (4) an overbroad force majeure clause that invites Verizon to violate parity standards and compromises the ability of the CLECs to obtain immediate and certain remedy payments.[29] AT&T Comments at 28-29.

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"also" found it "significant that the New York Commission considered and rejected most of these arguments." *Id.*

[28] See, e.g., Texas 271 Order ¶¶ 424-429; KS/OK 271 Order ¶¶ 273-278; Massachusetts 271 Order ¶¶ 240-247.

[29] In its evaluation, DOJ states that the BPU has adopted a PIP to ensure "an appropriate level of wholesale performance is maintained" after Section 271 approval, but notes that, during the Pennsylvania 271 proceeding, it expressed concerns regarding the structural defects in the Pennsylvania PAP. DOJ Eval. at 3 & n.6. However, the PIP suffers from the same or similar

Further compounding these problems, the PIP does not meet this Commission's criterion that it be a self-executing mechanism that "does not leave the door open unreasonably to litigation and appeal." Notably, in its final order approving the New Jersey PIP, the BPU acknowledged that Verizon had questioned its very authority to enforce remedial measures proposed by the BPU staff.[30] It must be emphasized that the 45-day period for filing any appeal from the BPU's final order approving the PIP has not yet expired. Indeed, this case stands in stark contrast to the Pennsylvania 271 proceeding, during which Verizon abandoned its state court appeal challenging the authority of the PAPUC *after* the PAPUC expressly conditioned its approval of Verizon's 271 application on Verizon's withdrawal of the appeal. AT&T at 27. Unlike the Pennsylvania proceeding, the BPU has *not* conditioned its approval of Verizon's 271 application on Verizon's waiver of any challenge to its authority or the final order.[31] And, importantly, Verizon has not waived its right to mount such a challenge.

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structural defects identified by the DOJ in its evaluation of the Pennsylvania PAP. The PIP includes no specific provisions that would permit the BPU flexibility "to shift potential payments to areas in which there are particular performance concerns." DOJ PA 271 Eval. at 16. Similarly, unlike the New York PAP that includes special penalties for performance failures on measures deemed important to competitive entry (such as total flow-through), the financial penalties under the PIP do not "reflect the relative importance of particular metrics to competition." *Id.* at 15. Further, the PIP is structured in such a manner that Verizon's incentive payments will be reduced if the transaction volumes decline or the number of CLECs decrease. As a result, the PIP necessarily creates "an incentive for Verizon to engage in behavior designed to reduce the number of CLECs in the state" (*id*. at 15-16 n.60). In addition, the force majeure provision in the PIP is so overbroad that it "compromises the [PIP's] ability to provide an immediate, certain remedy, thereby minimizing the need for litigation." *Id*. at 16 n. 63.

[30] *See, e.g.,* BPU January 10 Order at 14 (noting that Verizon argued that the Staff's proposal provided for "excessive payments … in the nature of fines or damages *that are not within the Board's authority to order*") (emphasis added); *id.* at 19 (referring to "VNJ's argument that the Board exceeds its authority in adopting this incentive plan").

[31] Notably, the BPU approved the UNE rates as TELRIC-compliant on the assumption that Verizon would not seek to challenge the rates and suggested that it would reconsider its decision if Verizon sought to do so. BPU at 24. In contrast, the BPU has not suggested that it would

Against this backdrop, approval of Verizon's application cannot be in the public interest because there remains substantial uncertainty as to whether the PIP would remain in effect – and thus, whether Verizon would experience any financial consequences for anticompetitive conduct against the CLECs. Furthermore, Verizon cannot credibly rely on the PIP as a basis for approval of its 271 application when it has previously challenged the authority of the New Jersey BPU to impose remedies and has not agreed irrevocably to accept the terms and conditions of the PIP. And, in all events, even if Verizon agreed to waive its right to challenge the PIP, the structural defects therein preclude it from serving as an effective mechanism to assure Verizon's future checklist compliance.

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reconsider its approval of Verizon's application if Verizon appealed from its final order or sought modification of the PIP.

**CONCLUSION**

For the foregoing reasons, and the reasons set out in AT&T's initial comments, Verizon's application for interLATA authorization in New Jersey should be denied.

Respectfully submitted,

Mark E. Haddad
David L. Lawson
R. Merinda Wilson
Ronald S. Flagg
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD, L.L.P.
1501 K St., N.W.
Washington, D.C. 20005
(202) 736-8000

Mark C. Rosenblum
Lawrence Lafaro
Richard Rubin
James Talbot
Frederick C. Pappalardo
AT&T CORP.
295 Basking Ridge, NJ
(908) 221-4481

*Attorneys for AT&T Corp.*

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